U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 25 2005
EAC 99 034 50559

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was initially approved by the Director, Vermont Service Center. On the basis of new information received and further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of intent to revoke the approval of the immigrant visa petition, and the reasons therefore, and ultimately exercised his discretion to revoke approval of the petition on July 5, 2002. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time of filing on November 9, 1998, the petitioner was working as an Associate Research Scientist in the Department of Applied Physics, Columbia University and NASA Goddard Institute for Space Studies. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in Applied Mathematics from the University of Virginia. The petitioner's occupation falls within the pertinent regulatory definition of a profession. *See* 8 C.F.R. § 204.5(k)(2). The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

The supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Through a precedent decision, *Matter of New York State Dept. of Transportation*, 22 I&N Dec. 215 (Comm. 1998), legacy Immigration and Naturalization Service (INS) has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The petition in this case was filed on November 9, 1998. Form I-140, Part 6, "Basic information about the proposed employment," indicates that the petitioner seeks employment as a "Researcher/Scientist" and that his work involves "[d]evelop[ing] models on super computers for research into prediction of climate, working in NASA (National Aeronautics and Space Administration), and develop[ing] weather models to help the U.S.A. avoid climate disaster."

In a letter accompanying the petition, counsel states:

> [The petitioner] has become a leading researcher in ocean circulation and climate prediction and their roles in delaying the greenhouse effect upon the earth.... Through his recurring publications and speaking engagements, he has developed General Circulation Models (GCM) of the Earth. These models have aided the scientific community to gain a better knowledge of global warming. [The petitioner's] work is of significant importance to the United States, and global environment. [The petitioner] requests his

application as... an advanced degree professional be granted with a waiver of labor certification in the national interest.

* * *

[The petitioner's] research, publications and speaking engagements are in the field of ocean circulation and climate prediction and how they affect global warming. Global warming is a very important issue to the United States Government. Its affect on the U.S. and the world environment is of permanent importance.... [The petitioner's] work, according to the enclosed letters and publications, is the research crucial to understanding what President Clinton deems the most important challenge of the 21st century.

The record contains several published articles, which counsel claims, demonstrate "the effect global warming has on the United States." Also submitted were several witness letters. We cite representative examples here.

A letter from [redacted] Columbia University, Department of Applied Physics, states: "[The petitioner's] research is crucial to the American effort to determine the appropriate response to rising concentrations of greenhouse gases and possible climate change."

Inez Fung, Senior Scientist, NASA Goddard Institute for Space Studies, states: "[The petitioner's] continued participation and leadership is absolutely crucial to the success of NASA's program in understanding the climate of earth."

Barbara Carlson, Research Scientist, NASA Goddard Institute for Space Studies, states:

[The petitioner's] continued research is crucial to the improved reliability of climate simulations.... I request that [the petitioner] be granted permanent residence with a waiver of the labor certification because his continued work in promoting the understanding of what causes global climate change as well as climate variability (e.g., El Nino) is in the national interest.

On the basis of the evidence presented, the petition was initially approved by the director on January 29, 1999. Citizenship and Immigration Services (CIS) records reflect that the petitioner was subsequently interviewed on July 25, 2001 at the San Francisco District Office in connection with his application to adjust status to permanent resident. According to a memorandum from the interviewing officer, a copy of which was provided to counsel, the petitioner stated that he no longer worked as a research scientist for Columbia University and NASA Goddard Institute for Space Studies. The petitioner is presently employed by McKinsey & Company, Inc., a management consulting firm, and his current work involves solving complex business problems for large corporate clients. The San Francisco District Office issued a letter requesting that the petitioner submit evidence from his current employer "describing [his] duties and how they relate to the national interest." The petitioner responded by submitting three witness letters that will be addressed below.

On May 14, 2002, the director advised the petitioner of CIS' intent to revoke the approval of the petition. The director stated that the national interest waiver petition was approved based on the petitioner's work "in the field of ocean circulation and climate prediction and their roles in delaying the greenhouse effect upon the earth." The director noted that the petitioner was no longer "working in the field for which the national interest waiver was granted."

In response, counsel cites an April 7, 1999 Immigration and Naturalization Service (legacy INS) memorandum concerning national interest waivers. That memorandum "instructs that all national interest waivers approved before the decision in *Matter of New York State Dept. of Transportation* should be honored in 245 or immigrant visa proceedings, provided that beneficiaries continue to seek employment in the professional activity that provided the basis for approval." Counsel states: "The [interviewing officer's] actions were completely in opposition to the INS Field Guidance on National Interest Waivers. The [approved national interest waiver petition] was not honored even though the beneficiary has continued to work in the same professional activity that provided the basis for approval."

Contrary to counsel's statement, we find the actions of the interviewing officer entirely appropriate. First, the April 7, 1999 memorandum cited by counsel states that national interest waivers approved prior to August 7, 1998 should be honored in section 245 of the Act or immigrant visa petition proceedings. Here, the petitioner's case was approved on January 29, 1999 (more than five months after *Matter of New York State Dept. of Transportation* was designated as a precedent decision). Therefore, we find that the interviewing officer's actions were not in opposition to the legacy INS field guidance on national interest waivers. Second, according to counsel's detailed initial statements and the wealth of evidence presented with the petition, "the professional activity that provided the basis for approval" of the national interest waiver petition in this case was (as clearly stated in the opening sentence of counsel's October 28, 1998 letter) the petitioner's work as a "leading researcher in ocean circulation and climate prediction and their roles in delaying the greenhouse effect upon the earth." Based on the evidence presented in support of the petition, it is apparent that the petitioner is no longer working in the same research field that served as the basis for the approved national interest waiver, nor is the prospective new employment in the same or similar occupation.

In response to the San Francisco District Office's request for evidence, the petitioner submitted letters from two individuals from McKinsey & Company, his current employer.

[redacted]Engagement Manager, McKinsey & Company, states:

> [The petitioner's] duties at McKinsey & Company are as follows: doing research, writing letters of proposal, and presenting research results. His research is fundamentally mathematical problem solving (the unit of measure in this case being mostly U.S.$).
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> We can use his mathematical and computational expertise to model complex economic and business systems in application areas such as telecommunications, electronics, transportation and logistics, electric power and natural gas, the insurance industry . . . .
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> * * *
>
> Our clients are the biggest and best corporations in the world – they include 80 of the 100 largest corporations in America.... The work undertaken by McKinsey teams and associates is seen by

McKinsey's clients to substantially benefit these companies and industries and therefore the national economy and the welfare of the United States of America.

Dr. Dietrich Chen, Senior Associate, McKinsey and Company, echoes Mr. Prema's assertions concerning the petitioner's specific job duties. Dr. Chen adds:

> [The petitioner's] expertise in both numerical and mathematical modeling has been tremendously helpful in aiding our clients make the right decision about their business. He has modeled complex economic and business systems in application areas such as telecommunications, electronics, transportation and logistics, and electric power and natural gas.

The petitioner also provided a letter from [redacted] Research Scientist, Columbia University, who served along with the petitioner as a post-doctoral researcher at NASA Goddard Institute for Space Studies during the 1990's. Dr. Cairns states: "[The petitioner's] work at Columbia University involved writing proposals, writing papers, and presenting research. Specifically: solving various problems using mathematical and numerical modeling techniques." [redacted] letter offers a general listing of the petitioner's prior duties at Columbia University in an attempt to show that those duties mirror his current duties at McKinsey & Company.

Counsel argues that the director ignored guidance pertaining to section 106 of the American Competitiveness in the Twenty-First Century Act (AC21), Public Law 106-313. The guidance was issued in the form of a memorandum from Michael Cronin, Acting Executive Associate Commissioner for Programs, dated June 19, 2001. Section 106(c) of AC21, establishing section 204(j) of the Act, states:

> A petition under subsection (a)(1)(D) [since re-designated section 204(a)(1)(F) of the Act] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Section 204(a)(1)(F) of the Act states: "Any employer desiring and intending to employ within the United States an alien entitled to classification under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) may file a petition with the Attorney General for such classification."

Counsel's argument is flawed because the stated ground for revocation in this case is not the petitioner's change of employers, but, rather, that he is no longer working in the same or similar occupational classification that served as the basis for the national interest waiver.

Guidance in the June 19, 2001 memorandum provides that the labor certification or approval of a Form I-140 employment-based (EB) immigrant petition shall remain valid when an alien changes jobs, if: (1) a Form I-485, Application to Adjust Status, on the basis of the employment-based immigrant petition has been filed and remained unadjudicated for 180 days or more; and (2) the new job is in the same or similar occupational classification as the job for which the certification or approval was initially made.

Counsel states: "The [director] is simply not following the standards established by the law. [AC21] was created because employers were stifling the ability of workers to move during the lengthy INS adjudicating period. This problem created positions of involuntary servitude." We note here that CIS has a documented history of granting national interest waivers in cases involving aliens who changed employers but continued working in the same field. We find in this case, however, that the petitioner is no longer working in the research field (ocean circulation and climate prediction) in which he initially proposed that his employment would substantially benefit prospectively the national interest of the United States.

Counsel's assertion is not persuasive. The three letters provided in response to the July 25, 2001 request for evidence do not demonstrate that the petitioner is seeking employment in the "same or similar occupational classification" as the job which provided the basis for approval of the national interest waiver. Simply providing a listing of several overlapping job skills does not automatically establish that the new job is in the same or similar occupational classification as the petitioner's prior job. More persuasive than the subjective witnesses' letters provided in response to the request for evidence would be contemporaneous evidence in the form of the original job offer letter from McKinsey & Company to the petitioner (outlining the position offered and its related duties). We note here that the letter from McKinsey & Company does not specifically identify the petitioner's job position at the firm or his occupational title. Based on the evidence presented, the AAO finds that the petitioner has not shown that his new job is in the same or similar occupational classification as the Associate Research Scientist position.

The record is clear that the petitioner is no longer working in the field of ocean circulation and climate prediction. The submission of witness letters claiming that general similarities exist in the petitioner's past duties as a scientific researcher and his present duties as a management consultant does not overcome the issues raised in the notice of intent to revoke. While the director has previously found that the petitioner's research related to global climate change is in the national interest, it is apparent that the petitioner is no longer working in that field. It should be emphasized that CIS initially approved the petition and waived the job offer/labor certification requirement so that the petitioner could continue his research related to ocean circulation and climate prediction and their roles in delaying the greenhouse effect upon the earth. That being the case, it simply defies logic to assert that the director should ignore that the petitioner no longer works in the scientific research field that formed the basis for the director's approval of the national interest waiver.

On July 5, 2002, the director issued a notice revoking the approval of the national interest waiver petition. The director properly exercised his discretion to revoke approval of the petition in this case.

In *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988), the Board of Immigration Appeals (BIA) found that approval of a visa petition vests no rights in the beneficiary of the petition but is only a preliminary step in the visa or adjustment of status application process, and the alien is not, by mere approval of the petition, entitled to an immigrant visa or to adjustment of status. The BIA further found that because "there is no right or entitlement to be lost, the burden of proof in visa petition revocation proceedings properly rests with the petitioner, just as it does in visa petition proceedings." The decision also notes that, pursuant to section 205 of the Act, CIS may revoke the approval of a petition "at any time for good cause shown." We find that *Matter of Ho* supports CIS' determination.

On appeal, counsel submitted a one-page letter briefly outlining the arguments discussed above. Counsel indicated that he would submit a brief and/or evidence to the AAO within thirty days. The appeal was filed on July 23, 2002. As of this date, the AAO has received nothing further.

Throughout this proceeding, counsel has largely ignored that it was the proposed benefit of the petitioner's research in ocean circulation and climate prediction that formed the basis for the director's initial approval of the national interest waiver petition. Because of his career change, the proposed future benefit to the national interest of the petitioner's work pertaining to climate research (subsequent to his admission as a permanent U.S. resident) no longer exists. According to Mitesh Prema's letter cited above, the proposed national benefit of the petitioner's work has now changed from environmental science to economics. In that regard, while petitioner's current work may benefit various business projects undertaken by his employer, his ability to impact the field beyond his firm's projects has not been demonstrated. The performance of economic research and mathematical modeling for a given business client is of interest mainly to that particular client. If the petitioner so chooses, he may file a new national interest waiver petition regarding the economic benefits associated with his present work for McKinsey & Company with the appropriate supporting evidence and fee.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The burden remains with the petitioner in revocation proceedings to establish eligibility for the benefit sought under the immigration laws. *Matter of Cheung*, 12 I&N Dec. 715 (BIA 1968), affirmed in *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) and *Matter of Ho, supra.* Here, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.